U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD B. JACKSON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Chicago, IL

Docket No. 97-2524; Submitted on the Record;
Issued December 13, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable employment; (2) whether the Office properly determined that appellant had received a $12,877.43 overpayment in compensation; and (3) whether the Office properly determined that appellant was not without fault in the creation of the overpayment.

On March 25, 1986 appellant, then a 44-year-old postal clerk, was lifting mailbags with a coworker when the coworker dropped his end. Appellant indicated that he felt a sharp pain in his back. He stopped working the next day. He underwent surgery on April 4, 1986 consisting of a decompressive lumbar laminectomy at L3-4, removal of a herniated disc at L4-5 and foraminotomies at L3-4, L4-5 and L5-S1 on the right side. He received continuation of pay for the periods March 26 through April 6, 1986 and April 17 through May 9, 1986, while using sick leave for the intervening period. The Office accepted appellant's claim for herniated disc at L4-5 and began payment of temporary total disability compensation effective May 10, 1986. Appellant returned to light-duty work on April 21, 1987 but had intermittent periods of partial or total disability, thereafter, for which he received compensation. On June 23, 1988 he stopped work and filed a claim for recurrence of disability. The Office accepted appellant's claim and began payment of temporary total disability compensation. Appellant returned to light-duty work on November 13, 1989. On January 20, 1990 appellant again stopped working. On March 14, 1990 appellant underwent additional surgery for removal of extensive scar tissue of the L4-5 area, decompression of the dural sac at L4-5 and foraminotomy at the L4-5 level on both sides. He received compensation for the periods he did not work. He returned to light-duty, part-time work on December 3, 1990. In an October 8, 1991 decision, the Office issued a schedule award for a 5 percent permanent impairment of the left leg and a 12 percent permanent impairment of the right leg. Appellant stopped working again on February 19, 1992 and filed a claim for recurrence of disability. The Office accepted his claim and reinstituted payment of temporary total disability compensation.

In a November 22, 1996 investigative report, a postal inspector indicated that appellant was hired on October 16, 1995 as a part-time community service officer for the village of Country Club Hills and became a full-time community service officer on March 25, 1996. He indicated that appellant had started work as a security guard for the Country Club Hills' town hall in May 1996. The postal inspector indicated that appellant had been performing unpaid volunteer work for the village since February 1993 performing street patrols. He related that town officials indicated that in the volunteer street patrols appellant would be driving approximately 95 percent of the time he was on patrol. He noted that appellant worked 23 days as a volunteer in 1994 working from 4 to 9 hours each day. The postal inspector reported that appellant worked 47 days as a volunteer prior to being hired in his part-time position, averaging 5 to 6 hours a day, once working 17 hours for 1 day. He indicated that when appellant became employed he worked up to nine hours a day on street patrol. In a July 17, 1996 CA-1032 form, appellant indicated that from November 30, 1995 to the present he had been working as a security guard at $8.00 an hour. He also reported that he had worked as a volunteer from February 1994, working approximately eight hours a month. He indicated that he did not receive any form of monetary or in-kind compensation for his volunteer work.

In a July 12, 1996 letter, the employing establishment offered appellant a position as a modified rehabilitation clerk position, full time, effective July 20, 1996. It indicated that the duties of the job were answering the telephone and servicing the public. The employing establishment stated that the physical requirements of the job were lifting less than 10 pounds, occasional standing, sitting 30 to 40 minutes an hour and occasional reaching at the waist. The employing establishment indicated that the salary of the position was $36,135.00 annually. It noted that the offer remained available until the Office made a final decision. The employing establishment warned appellant that refusal of the job might lead to termination of compensation.

In a July 17, 1996 response, appellant refused the offered position because he would be commuting on public transportation an hour and a half each way to and from the job site, including climbing stairs and walking a block and a half to the site.

In a March 13, 1996 report, Dr. Raghu R. Singh, a neurosurgeon, described appellant's back surgeries and noted that he still complained of occasional low back pain. Dr. Singh concluded appellant had reached maximum medical benefit and noted he had advised appellant to file for disability. In a July 23, 1996 work restriction evaluation, Dr. Singh indicated that appellant could do occasional standing for a half to a full hour at a time, three to four hours a day. He concluded appellant could work six to eight hours a day. In a November 6, 1996 letter to Dr. Singh, the Office noted that he indicated appellant could work six to eight hours a day and asked whether he could perform the duties of the offered position. In a November 14, 1996 report, Dr. Singh stated that he had reviewed the job description and stated that appellant "should give it a try at this time with the restrictions outlined in the last page of the letter." However, in an office note of the same date, Dr. Singh expressed doubt that appellant could return to his original work duty, even as modified.

In a November 22, 1996 decision, the Office informed appellant that it found that the job offered by the employing establishment was suitable and remained available. The Office informed appellant that he had 30 days to accept the position or provide a reason for refusing it.

It indicated that any explanation or evidence he provided for declining the position would be considered before determining whether his reasons for refusing the position were justified. The Office warned appellant that if he failed to accept the position and failed to show his refusal was justified, his right to further compensation would be jeopardized.

In a December 3, 1996 response, appellant indicated that he was only able to drive for 15 minutes at a time. He discussed the difficulties he would have in commuting to the offered position. He stated that his physician had advised him that, with the weather, walking and travel time, he could not recommend appellant taking the job offer. Appellant noted that his current job was 4½ minutes from his house, he was provided with transportation and he made $8.25 an hour. He pointed out that the position required him to sit at a desk and give information, which was the same type of position offered by the employing establishment. He commented that if the employing establishment were to offer him such a position within five minutes of his house and provide transportation, he would accept it.

In a January 14, 1997 letter, the Office informed appellant that it found the position offered to him to be medically and vocationally suitable to him. It concluded that his reasons for refusing the job were not justifiable. He was given 15 days to accept the offered position or face termination of compensation.

In a March 27, 1997 decision, the Office terminated appellant's compensation effective March 30, 1997 on the grounds that he refused suitable work. In a memorandum accompanying the decision, the Office found that the job appellant currently was working did not fairly and reasonable represent his wage-earning capacity because he would earn more from the offered position than he would from the position he was currently holding.

In a June 9, 1997 letter, the Office informed appellant that he had received a $12,877.43 overpayment in compensation because he refused suitable employment and had worked from March 3, 1996 to March 27, 1997 at a position, which did not reasonably reflect his ability to earn wages. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he knew or reasonably should have known that the wages he had earned did not reasonably represent his wage-earning capacity. In July 21, 1997 decision, the Office found that appellant had received a $12,877.43 overpayment in compensation because he refused suitable employment and was working at another position from March 3, 1996 to March 27, 1997 that did not reasonably reflect his wage-earning capacity. The Office further found that its preliminary finding that appellant was at fault in the creation of the overpayment was correct.

The Board finds that the Office improperly found that appellant had refused suitable work.

Section 8106(c) of the Federal Employees' Compensation Act states: "A partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered … is not entitled to compensation."[1] An employee who refuses or

[1] 5 U.S.C. § 8106(c).

neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[2]

The Board has held that if a claimant already has employment at the time the employing establishment offers a position, the Office must first determine whether the actual earnings the claimant receives from the current employment fairly and reasonably represents his wage-earning capacity. The Office must first find that the actual earnings do not fairly and reasonably represent appellant's wage-earning capacity before it can consider whether the position offered by the employing establishment constitutes suitable work.[3] The Office's procedures recognize that if a claimant has a job that fairly and reasonably represent his wage-earning capacity, he has sufficient reason to refuse an offer of employment.[4]

The determination of whether current actual earnings fairly and reasonably represent a claimant's wage-earning capacity must be based on a full consideration of all factors involved in the case. The Office's only stated reason for finding that appellant's work as a security guard did not fairly and reasonably his wage-earning capacity was that he would receive higher wages in the offered position. The Board has stated that the mere fact that a claimant is offered a higher paying position by the employing establishment does not mean he has a higher earning capacity.[5] The Office cannot make such a determination by comparing what a claimant is actually earning with an offered position in the federal government. In making such a determination, the Office must determine whether the actual earnings appellant was receiving fairly and reasonably represented what he could have received in the general labor market in the commuting area, in which he lived, not in an odd lot or specially created position within the closed labor market of the federal government.[6] The Office did not undertake a review of the open labor market in appellant's commuting area before concluding that the position of security guard did not fairly and reasonably represent his wage-earning capacity. The determination that the position offered to appellant, therefore, was premature because the Office had not developed the record sufficiently to support a finding that actual earnings from the position of security guard did not fairly and reasonably represent appellant's wage-earning capacity.

The Office's decision that the offered position was suitable was also flawed because it was based on equivocal, inconsistent medical evidence. Dr. Singh had first stated that appellant should file for disability. He then indicated that appellant could make an effort to see if he could perform the offered position. Yet, in an office note of the same date, Dr. Singh expressed doubt that appellant could perform the modified position offered to appellant. The Office did not present any clear, unequivocal statement from a physician that appellant could perform the duties

[2] 20 C.F.R. § 10.124.

[3] *Michael E. Moravec,* 46 ECAB 492 (1995).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity,* Chapter 2.814.7 (December 1993).

[5] *Wallace D. Ludwick*, 38 ECAB 176 (1986).

[6] *David Smith,* 34 ECAB 409 (1982); *cf Thomas F. Jordan,* 47 ECAB 382 (1996).

of the offered position. For these reasons, the Office improperly terminated appellant's compensation for refusal to accept suitable work.

The Board finds that the Office properly determined that appellant had received an overpayment in compensation.

Appellant returned to part-time work on October 15, 1995 and full-time work on March 25, 1996. He, therefore, was receiving wages while also receiving temporary total disability compensation until the Office terminated compensation effective March 30, 1997. Appellant was not entitled to receive wages for work he was performing while also receiving temporary total disability compensation. At most, he would have been entitled to compensation for a loss of wage-earning capacity.[7] Appellant, therefore, received an overpayment of compensation.

The Board, however, finds that the Office used an improper basis to conclude that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment of recovery would defeat the purpose of the Act or would be against equity and good conscience."[8] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's regulations provide in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> (2) Failed to furnish information which the individual knew or should have known to be material; or
>
> (3) With respect to the overpaid individual only, accepted a payment the individual knew or should have been expected to know was incorrect."[9]

[7] *Claude T. Green*, 42 ECAB 274 (1990). The Board notes that the calculation of the amount of the overpayment was based on a determination of appellant's loss of wage-earning capacity for the period for the period March 3, 1996 through March 29, 1997 and then subtracting that amount from the total amount of compensation appellant received for the same period for temporary total disability. However, the Board cannot determine how the Office determined appellant's wage-earning capacity. In any further development of the case, the Office should clearly explain how the amount of the overpayment was calculated.

[8] 5 U.S.C. § 8129(b).

[9] 20 C.F.R. § 10.320(b).

The Office, in finding that appellant was not without fault in the creation of the overpayment, concluded that appellant knew or should have known that the work he was performing did not reasonably represent his wage-earning capacity. As found above, the Office improperly found that the position offered to appellant was suitable work. Furthermore, the finding that appellant knew or should have known that the job he was performing did not represent his wage-earning capacity does not meet any of the three tests for determining whether appellant was not without fault in the creation of the overpayment. A finding that appellant knew or should have known that the job he was performing did not represent his wage-earning capacity presupposes a legal determination that appellant, in this case, disputed. Appellant contended that the job offered to him was not suitable, in part because he was already performing a job. The Office never undertook a formal determination that the actual earnings appellant received from his security guard position did not fairly and reasonably represent his wage-earning capacity. A legal determination that the security guard position did not reasonably represent appellant's wage-earning capacity was not made until the Office issued its March 27, 1997 decision. Until that time, appellant cannot be said to have known or should have known that the job he was performing represented his wage-earning capacity. A determination that appellant was at fault in the creation of an overpayment because he knew or should have known that the position he was performing did not represent his wage-earning capacity does not satisfy the criteria for finding fault under section 10.320(b) of the regulations governing determining fault. The Office's finding that appellant was at fault in the creation of the overpayment, therefore, was based on an improper standard that does not exist in the above regulations. The Office did not consider whether appellant's actions in this case met any of the three standards for determining whether he was not without fault in the creation of the overpayment.

The decision of the Office of Workers' Compensation Programs dated July 21, 1997 is hereby affirmed insofar as it finds that appellant received an overpayment in compensation. It is hereby reversed insofar as it finds that appellant was not without fault in the creation of the overpayment because he knew or should have known his actual earnings did not reasonably represent his wage-earning capacity. The decision of the Office dated March 27, 1997 is hereby reversed.

Dated, Washington, D.C.
December 13, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member